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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1948

No. 553

STEPHEN J. ROTH, Attorney General, Successor to EUGENE F. BLACK, Attorney General, in the name and on behalf of the people of the State of Michigan,

Petitioner,

vs.

PRESTON DELANO, Comptroller of the Currency of the United States of America, and

JOSEPH T. CONNOLLY, as Receiver of the First National Bank—Detroit, a National Banking Association, and as Detroit Representative, Comptroller of the Currency of the United States of America,

Respondent.

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR CERTIORARI

A brief reply is required because respondent, in his anxiety to prevent review, has brought up matters not of record and not pleaded or argued below. He fears review of the decision which in effect permits the United States, rather than a State, to escheat deposits due upon proven claims against national banks in liquidation.

The Suit Is Not Moot

Now for the first time respondent claims as a defense that by Act No. 329 of the Public Acts of Michigan for 1947 (after the institution of this suit) the State, in enacting a

new code of escheats, repealed the statute here involved, although expressly providing (Sec. 65) "that no pending suit or proceeding shall abate or be in any way affected by such repeal".

To state this saving clause is sufficient to end the question of "mootness". Declaratory judgment suits are, of course, "suits or proceedings" and by the express terms of the federal statute have the force of final judgments subject to review, and in such a suit, after judgment and after reasonable notice and hearing, further relief may be granted under the statute without further suit (Title 28, U.S. Code, Sections 2201-2202).

This would be true even if the federal statute did not expressly so provide. As stated in Borchard, Declaratory Judgments, page 172:

> "The declaration is an authoritative adjudication and guide to conduct, and rarely, so far as records disclose, has it become necessary again to invoke the aid of the court to carry a declaratory judgment into forceful effect. Whether or not the original declaratory order or decree reserves the liberty to apply for further relief, if necessary, such liberty is always implied and the American statutes make special provision for it."

Aside from the fact that in the pending suit, under the Michigan statute here involved and the federal statute, full relief can be given, it is clear that, even if it were necessary to institute a new suit under the new Michigan code (because the receiver or the Comptroller refused to abide by the decision of this Court), this Court's determination would still be controlling of suit under the new code. *The decision below was not based on any particular wording*

of the Michigan law or on alleged inapplicability thereof, but was on the square ground (R. 100) that the Michigan law unlawfully interfered with the liquidation of a national bank under federal law. A decision here affirming the court below would make void not only the Michigan statute here involved but the new Michigan code and any otherwise valid escheat law of any State which purported to apply, among other things, to national banks in liquidation. A decision here reversing the court below, however, would validate not merely the law here involved but also the new Michigan escheat code and valid laws of all other States.

The new Michigan code does not vary from the law here involved in its applicability to all banks and receivers; and respondent has failed to point out in what way material to the questions here at issue it differs from the former law. It does not differ.

The chief meritorious question here is: Can the State of Michigan, by an otherwise valid escheat law, obtain escheat of proven claims against national banks in liquidation, or do the funds remain indefinitely in the United States Treasury because the State law is invalid as repugnant to the federal law?

Respondent now claims (Brief, p. 6) that the validity of the Michigan law was not discussed below. However, among other places, respondent in the court below stated:

> "What appellant seeks would intrude upon the provisions of the National Bank Act." (Defendant's reply brief in Court of Appeals, p. 4)

We agree that this is the main issue. It is the issue upon which the Court of Appeals decided the case.

The present controversy is actual, immediate and real and neither academic nor moot. Respondent never claimed otherwise until his brief here in opposition to certiorari, and the court below did not so find in its decision on the merits seventeen months after the passage of the new Michigan code.

Far from being moot, the present suit is the indispensable step crossing the threshold of enforcement of State escheat laws. The respondent refuses to make report of the amounts of proven deposits unclaimed and the names of the depositors (R. 13). It is the rest of the procedure to collect which becomes moot, if the State law is held invalid, in that no further action can be taken without such records. If, on the other hand, the law is held to be valid, not only will the reports be obtained but the declaratory judgment law permits further action in this suit to collect the funds (Title 28, U.S. Code, Sections 2201-2202).

No Settlement Agreement Disposed of This Suit

Respondent seeks to prevent review by appending to his brief a settlement agreement of prior suits involving the entirely different question of claims which had been abandoned and not proved by the claimants. No settlement agreement was pleaded (R. 64-65), nor is the agreement in the record below or in any prior proceedings in this Court. An attempt in the court below to prejudice the court by a document referring to and quoting from the settlement agreement was stricken from the files (R. 97), "for the reason that it carries beyond the record in the case and contains argumentative matter not presented consistently with the rules of this court". It should likewise be stricken here.

If this Court cares to look at all at this improperly presented agreement, it will be seen at once that it only settled claims on dormant unproven deposits and not the right of the State to succeed to proven claims later abandoned, which is the matter now at issue for the first time.

No Prior Suit Has Settled the Present Question

Although respondent did not plead *res adjudicata* nor did the court below so hold, respondent nevertheless contends that prior suits in the Court of Appeals decided the present question, and appends to his brief copy of prayers in the former suits. He neglects to inform the Court that the only deposits involved in the former suits, as made clear by the petitions therein, were those upon which no claims had been filed, while those in the present suit are those upon which claims were proved but not later collected for seven years by the depositors (R. 5, 12-13), as the court below pointed out (R. 101).

We quote in the appendix the fact averments in the prior suits as to the deposits with respect to which escheat was then sought. The court made this distinction clear, not only in the instant cause but in *Starr v. O'Connor,* 118 F. 2, 548, 550.

We refer also to our brief in this Court in case No. 566 in opposition to appellee's motion to dismiss (pp. 1-4).

The Proper Party Defendant Is Before the Court

Respondent now claims that the Comptroller of the Currency (who was dismissed from the present case because not a resident of the district) is a necessary party; and this

in spite of the fact that counsel for respondent obtained his dismissal as an unnecessary party in an earlier case. *Starr v. O'Connor*, 118 F. 2, 548, 550.

It is clear law, established by a long line of decisions, that a suit to enforce a claim against a national bank in liquidation may be brought against the receiver without joining the Comptroller. Such cases are cited in our original brief in support of certiorari, page 16, and our brief in opposition to motion to dismiss the appeal in Docket No. 566, page 10, and we shall not repeat them here.

Respondent seeks to rely on a self-serving statement of the Comptroller in a report to Congress that the receivership was closed, and claims the receiver therefore cannot be sued. However, petitioner in his petition alleged defendant Connolly to have been appointed and to be acting as receiver (R. 3-4), which averment was admitted by defendant's motion to dismiss. Although in an affidavit annexed to the motion respondent claimed that the receivership was "deemed technically closed" (R. 70), the same affidavit discloses (R. 72) that defendant Connolly was given a commission as receiver "to act in such incidental cases that might require action by a receiver". This is one of such cases. Furthermore, after this suit was started, Connolly, as receiver, entered into a stipulation permitting him to send records to the Comptroller without prejudice to the issues involved (R. 48).

If respondent had had any confidence in the present claims that this suit had been settled by prior agreement, that it is moot by reason of a change in the Michigan statute, or that an admitted receiver is not a receiver, he would have sought summary judgment below and not sought and

obtained decision in his favor on the merits, *viz.*, that the Michigan law is invalid as intruding upon the National Bank Law.

Respondent even claims that the present suit amounts to one against the United States, disregarding the cases cited by us and innumerable other ones sustaining suits on claims against bank receivers. The funds awaiting payment on proven claims do not belong to the United States. Congress has no power, even had it wished, to declare escheat thereof to the United States. *Anderson National Bank v. Luckett*, 321 U.S. 233, 240-241, 248; *American Loan & Trust Co. v. Grand Rivers Co.*, 159 Fed. 775 (W.D. Ky.). The fact that the funds may be paid into the United States Treasury does not prevent escheat under a State law. *United States v. Klein*, 303 U.S. 276. As we have pointed out, moneys payable on proven claims do not augment payments otherwise due on other claims. The same will lie in the Treasury indefinitely unless the State is held validly to succeed to proven claims under its right to control the devolution of property and unless the State can take action to discover the claimants or their successors. Thus, although the United States has no right to keep the funds and does not claim the right, respondent nevertheless seeks, in effect, to have the money escheat to the United States, by contending that this is a suit against the United States and not properly brought against the receiver.

Conclusion

It is unfortunate that we have been compelled to take the time of this Court to remove red herrings from the trail. They did not divert the court below from the one meritorious issue, *viz.*, is an otherwise valid State escheat law invalid in its application to a national bank in liquidation with respect to proven claims when the claimant cannot be found for seven years or more? The court held that the State law was an unlawful interference.

As stated in *Prigg v. Pennsylvania*, 16 Peters 539, 617-618, a State does not have a right to interfere with a federal regulation on a particular subject "if Congress have a constitutional power to regulate a particular subject". Congress has no power to regulate escheats. There is therefore no invalid interference.

The National Bank Law does not purport to cover the matter of succession, by assignment, escheat or otherwise, to proven claims against banks in liquidation. Otherwise valid escheat laws have been held proper in their application to operating national banks. *Anderson National Bank v. Luckett*, 321 U.S. 233.

That the bank is in liquidation makes no difference. The present case is merely an example of the general principle that national banks are subject to State laws which do not interfere with the purpose of their creation or impair their efficiency as federal agencies. *National Bank v. Commonwealth*, 9 Wall. 353; *McClellan v. Chipman*, 164 U.S. 347; *First National Bank v. Missouri*, 263 U.S. 640, 656.

The decision in the court below was contrary to decisions of this Court and should be reviewed here, either by appeal

in Docket No. 566 or by granting of certiorari. We are certain that the Court's attention will not be diverted from the issue presented by extraneous matters not involved, not of record, not presented below, or of no valid consequence.

Respectfully submitted,

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APPENDIX

APPENDIX

Averments of Petition in Starr v. O'Connor as to Deposits Involved

(R. Page 5 in That Suit)

"That your petitioner is informed and verily believes that the records of the defendant disclose that there are approximately one hundred twenty-five thousand one hundred six (125,106) individual deposit balances, totalling Two Million Thirty-eight Thousand Two Hundred Seventy-one Dollars and Forty-eight cents ($2,038,271.48), which appeared as liabilities upon the books of the First National Bank-Detroit as of its suspension on the 11th day of February, A.D. 1933, upon which no claims have been presented or filed with said Receiver or his predecessor, or upon which balances no demands have been made for payment by the persons who made such deposits, prior to the date hereof."

Averments of Petition in Rushton v. Schram as to Deposits Involved

(R. Page 7 in That Suit)

"That your petitioner is informed and verily believes that the records of the defendant disclose that there are approximately one hundred fifteen thousand five hundred and forty-six (115,546) individual deposit balances, totalling One Million Twenty-eight Thousand One Hundred Seven Dollars and Seventy-six Cents ($1,028,107.76), which appeared as liabilities upon the books of the First National

Bank-Detroit as of its suspension on the 11th day of February, A.D. 1933, upon which no claims have been presented or filed with said Receiver or his predecessor, or upon which balances no demands have been made for payment by persons legally entitled to make claim for same, prior to the date hereof."